(11)

No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF ALABAMA EMPLOYMENT LAWYERS ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; JOAQUIN G. AVILA; COOPER, MITCH, CRAWFORD, KUYKENDALL & WHATLEY; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.; JAY-ALLEN EISEN LAW CORPORATION; ERICKSON, BEASLEY, HEWITT & WILSON; LAW OFFICE OF ALAN B. EXELROD; LAW OFFICES OF RICHARD B. FIELDS; FERGUSON, STEIN, WATT, WALLAS, ADKINS & GRESHAM, P.A.; JULIAN, OLSON & LASKER, S.C.; LEGAL SERVICES FOR PRISONERS WITH CHILDREN; LEGAL SERVICES OF NORTHERN CALIFORNIA; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.;

(Amici Continued on Inside Cover)

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INTEREST OF *AMICI CURIAE*[1/]

Amici are not-for-profit legal services organizations, private law firms and sole practitioners from throughout the United States. The legal services organizations engage in a wide variety of public interest litigation. They depend on reasonable attorney's fees awards, pursuant to fee-shifting statutes, to finance their litigation. The enhancement of their attorney's fees to compensate for the risk of taking matters on a contingency basis enables them to attract cooperating counsel from private law firms. Without the ability to attract private counsel, they would be unable to obtain representation for many of the prospective clients who seek their legal assistance.

The private law firm and sole practitioner *amici* devote a substantial portion, if not all, of their practices to public interest litigation under a variety of fee-shifting statutes. This litigation is virtually always undertaken on a contingency basis. If contingent risk enhancers were not available to compensate these private attorneys when they prevail, economic necessity would force many of them to turn down meritorious cases in favor of hourly-fee paying clients.

More detailed Statements of Interest for each *amicus* are contained in the Appendix attached to the Brief.

SUMMARY OF ARGUMENT

Many public interest statutes, including the Solid Waste Disposal Act, the Clean Water Act and a host of others, contain "fee-shifting" provisions that entitle

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[1/] Letters of consent to the filing of this Brief have been lodged with the Clerk of the Court, pursuant to Rule 37.3.

prevailing plaintiffs to recover their reasonable attorney's fees, in addition to whatever other relief they may be awarded in the course of litigation. The determination that a "reasonable" attorney's fees award in a case brought under a fee-shifting statute includes an enhancement for contingent risk reflects the recognition by many courts that legal services, like other services, are priced in accordance with the principles and practices of the marketplace.

The legislative history of Section 1988 of the Federal Civil Rights Attorney's Fee Award Act of 1976 -- which sets the standard for attorney's fees awards to prevailing parties in cases brought under federal fee-shifting statutes -- reveals Congress' intent that the marketplace determine the amount of a reasonable attorney's fees award. Market analysis, in turn, dictates that an attorney who prevails on behalf of a plaintiff in an action brought under a fee-shifting statute should be compensated not only for the time expended prosecuting the action but also for the risk associated with bringing the litigation. Without the prospect of contingent risk enhancement, competent attorneys, operating in accordance with market principles, will decline to undertake such litigation, and those persons intended to be benefitted by the statutes containing the fee-shifting provisions will be disserved.

Five Justices of this Court have acknowledged the crucial role that contingent risk enhancement plays in the legal services market. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711 (1987) (*Delaware Valley II*) (O'Connor, J. concurring; Blackmun, J. dissenting). In the five years that have elapsed since *Delaware Valley II*, the two-part test set out in Justice O'Connor's concurring opinion has proved both workable and fair. As applied by numerous lower courts, it has yielded reasonable attorney's fees awards, while furthering Congress' essential purpose: that those persons intended to

be benefitted by fee-shifting legislation have access to competent counsel willing and able to represent them.

The principal concern of the plurality in *Delaware Valley II* -- that an enhancement for a contingent risk undermines the "prevailing party" requirement by compensating counsel who prevail in one case for other cases in which they do not prevail -- is dispelled both by sound economic analysis and by the post-*Delaware Valley II* experiences and findings of federal courts in a number of jurisdictions. These decisions fully validate what the legislative history of Section 1988 teaches: when the market is the measure of a reasonable attorney's fees award, a contingent risk enhancer is necessary and appropriate to fulfill Congress' intent that the public interest statutes it enacts be enforced, and that competent counsel be reasonably and fairly compensated for their efforts to that end.

ARGUMENT

I. In Enacting Fee-shifting Statutes, Congress has Mandated that the Amount of Attorney's Fees Awarded to Prevailing Plaintiffs be Determined in Accordance with Relevant Private Markets for Legal Services.

Although the instant case arises under the attorney's fee provisions of Section 7002 of the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), and Section 505 of the Clean Water Act, 33 U.S.C. § 1365(d), this Court has determined that the fee-shifting standards applicable to those statutes are the same as those applicable under Section 1988 of the Federal Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560-62 (1986) (*Delaware Valley I*). Central to the inter-

pretation of all public interest attorney's fees statutes, therefore, is Senate Report No. 94-1011 (1976), which sets out the legislative history of Section 1988. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 893-95 (1984). Senate Report No. 94-1011 bears on all facets of fee setting under Congress' fee-shifting statutes, including risk enhancement. *See, e.g., Delaware Valley II*, 483 U.S. at 723-24. The most relevant portion of Senate Report No. 94-1011 states:

> It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be non-pecuniary in nature. The appropriate standards, *see Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 FRD 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 EPD ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 FRD 483 (W.D. N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep. No. 94-1011 at 6 (1976). The standard set out in *Johnson v. Georgia Highway Express* is stated in terms of twelve factors: (1) The time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) *whether the fee is fixed or contingent;* (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-719. The legislative history of Section 1988 thus embraces a standard that includes risk enhancement.

It is noteworthy that in enacting Section 1988 Congress used as a reference point the highly contingent field (for plaintiffs' counsel) of federal antitrust litigation. Given that reference, the antitrust field's market model should guide "the amount of fees awarded under" Section 1988 and similar statutes, absent express statutory language or clear legislative history to the contrary. *See, e.g., Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 636-37 (9th Cir. 1989) (applying the analysis of Justice O'Connor, concurring, in *Delaware Valley II* to fee enhancement under the Clayton Act in a Robinson-Patman case).

Consistent with the legislative history of Section 1988, this Court has repeatedly ruled, with rare exclusively statutory exceptions, that the principles and practices of the market determine both the amount and the components of attorney's fees awards under fee-shifting statutes. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (in determining how certain attorney's fees award are to be calculated, this Court has "consistently looked to the marketplace as [its] guide to what is reasonable"). Thus, under Section 1988 this Court has held that private market practices mandate that the prevailing party be awarded compensation for the work of salaried attorneys and paralegals at their market hourly billing rates, rather than on an actual cost basis. *See Blum v. Stenson*, 465 U.S. at 894-895; *Missouri v. Jenkins*, 491 U.S. at 287-89. This Court has also held that both hourly rates and compensable time are determined essentially as the market determines them, subject to adjustment on the basis of considerations such as the complexity and novelty of the legal issues and the quality of the services rendered. *See, e.g., Missouri v. Jenkins*, 491 U.S. at 285-289, *Blum v. Stenson*, 465 U.S. at 894-95.

In addition, this Court has recognized that market considerations mandate an upward adjustment of fees to compensate for delay. *Jenkins v. Missouri*, 491 U.S. at 283-84. Furthermore, the Court has validated market practices that permit attorneys to be awarded fees that exceed the amount provided in contingency fees contracts, *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989); that permit attorneys to collect fees from damages, in addition to court awards of fees, *Venegas v. Mitchell*, 495 U.S. 82 (1990); and that permit plaintiffs in certain class actions to enter into settlements that include waivers of attorney's fees, *Evans v. Jeff D*, 475 U.S. 717 (1986). Finally, the Court has held that full attorney's fees are to be awarded to prevailing plaintiffs even when their fees exceed by multiples the amount of the damages award. *See City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986).

With respect to contingent risk enhancement, Justice White's plurality opinion in *Delaware Valley II*, while limiting the availability and the amount of contingent risk enhancers, acknowledges the relevance of the market. 483 U.S. at 726-27. The plurality's only real concern with full contingent risk enhancement is that an award enhanced to take account of risk might compensate prevailing plaintiffs' attorneys for work they performed in other cases in which their clients did not prevail. *Id.* at 724-25. As argued more fully in Section II, however, the contingent risk enhancer *is* the price that *the market* dictates plaintiff's counsel should be paid for the services he or she rendered *in the case in which the plaintiff prevailed*.

Congress is fully able, if it wishes, to delineate an approach other than that of market analysis. *See Crawford Fittings Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Notably, Congress has demonstrated its ability explicitly to preclude the award of contingent risk enhancers, if it so intends, as it did in the Individuals with

Disabilities Education Act, ("IDEA"), 20 U.S.C. §§ 1400-1485 (1988). As provided by Sections 1415(e)(4)(B) and (C), a court may award "reasonable attorneys' fees" to prevailing plaintiffs, but "[n]o bonus or multiplier may be used in calculating the fees awarded . . . ."

Further, it is relevant that Congress has considered and rejected several attempts to eliminate enhancers, at least against government defendants. In 1982, Senator Hatch proposed an amendment to Section 1988 that would have prohibited "awards based on contingency factors or enhancers." S. 585, 97th Cong. 2d Sess. § 722A (1982). In addition, four bills were introduced that would have imposed a $75 per hour cap on attorney's fees awarded to plaintiffs who prevailed against government defendants, and eliminated enhancers under all federal fee-shifting provisions. Neither Senator Hatch's amendment nor any of the proposed bills passed. *See* S. 2802, 98th Cong., 2d Sess. (1984); H.R. 5757, 98th Cong. 2d Sess. (1984); S. 1580, 99th Cong. 1st Sess. (1985); and H.R. 3181, 99th Cong. 1st Sess. (1985). As recently as last year, an amendment that would have limited attorney's fees to 20% of the total award was proposed as part of the Civil Rights Act of 1991. 137 Cong. Rec. S 15338-39 (daily ed. Oct. 29, 1991). That proposed amendment also failed.[2/]

Congress has also set limits or caps on attorney's fees awards under specific statutory schemes. *See e.g.*, 28 U.S.C. §§ 2412(d)(1)(A) and (2)(A)(1988) (fee awards under the Equal Access to Justice Act "shall be based upon prevailing market rates . . . except that . . . attorney fees shall not be awarded in excess of $75 per hour . . .); 42

[2/] Congress' rejection of proposed amendments indicates that it does not intend the law to include the provisions embodied in the rejected amendments. *C.f.* Lapina v. Williams, 232 U.S. 78 (1914); United States v. Great Northern R. Co., 287 U.S. 144, 155 (1932).

U.S.C. § 300aa-15(b) (1988) (fee awards under the National Vaccine Injury Compensation Act of 1986 limited to $30,000); 28 U.S.C. § 2678 (1988) (fees under Federal Tort Claims Act limited to 20% of administrative settlement; 25% of judgment or settlement); 42 U.S.C. §406(b)(1) (1988) (fees under Social Security Act limited to 25% of award); 22 U.S.C. § 277d-21 (1988) (fees under American-Mexican Chamizal Convention Act of 1964 limited to 10%); 48 U.S.C. § 1424c(f) (1988) (fees for claims regarding land under Organic Act of Guam limited to 5% of award); 50 U.S.C. app. § 1985 (1990) (fees under Japanese-American Evacuation Claims Act of 1948 limited to 10% of award).

Because Section 1988 and the statutes at issue here do not by their terms preclude the use of contingent risk enhancers, market practices are controlling. As described more fully below, those practices are plainly consistent with the award of attorney's fee enhancers, at the courts' discretion and under appropriate circumstances.

II. Application of Market Principles and Practices Mandates that Prevailing Parties in Actions Brought Under Fee-shifting Statutes be Awarded Contingent Risk Enhancers.

The difficulty in determining appropriate attorney's fees awards in statutory fee-shifting cases is in part attributable to the confusion over the nomenclature used. Many of the cases refer to "windfalls," "bonuses" or "multipliers." The impression that this language conveys is that a lawyer who seeks an enhancement for contingent risk after prevailing in a fee-shifting case is somehow seeking more than is properly due.

But that impression is false and misleading. As five Justices in *Delaware Valley II* recognized, lawyers who bring actions under fee-shifting statutes are simply operating under the normal rules of the market in which they operate. All practicing litigation attorneys know that they charge a different rate depending on whether they will be paid on a regular hourly basis or only if they win. Whether the case is an antitrust case in Seattle, a personal injury case in Boston, a securities fraud case in New York, a patent infringement case in Philadelphia, an employment discrimination case in San Francisco, a breach of contract case in St. Louis or an environmental case in Vermont, lawyers who are not assured of being compensated for their efforts must, and do, negotiate their fees accordingly.

It is not a question of getting a "windfall" or a "bonus" if one succeeds. Rather, the business and economic reality is that statutory fee-shifting cases must be treated differently, from a fees perspective, from cases for which counsel is compensated on a risk-free hourly basis. In the unregulated market for legal services, virtually all lawyers charge either hourly rates that must be paid regardless of outcome, or contingency fees that are paid only if the lawyer succeeds. Contingency fees inevitably are higher, so that prevailing lawyers are compensated for the additional risk of a negative outcome. The American Bar Association ("ABA") which monitors and enforces fee-setting practices in the legal profession, fully authorizes attorneys to seek compensation for contingent risk. Disciplinary Rule No. 2-106(B) of the ABA Model Code and Rule 15 of the ABA Model Rules list the following eight factors for determining the reasonableness of attorney's fee awards, including contingent risk:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) *Whether the fee is fixed or contingent.* . . .

(Emphasis supplied.) Lawyers thus reasonably and properly demand, and the market dictates, that in fee-shifting litigation they be compensated for the contingent risk inherent in plaintiff's-side fee-shifting litigation.

This Court has recognized that a "reasonable" attorney's fee award may provide contingent risk enhancement. In *Department of Labor v. Triplett*, 494 U.S. 715 (1990), this Court upheld the attorney's fees provision of the Black Lung Benefits Act of 1972, 30 U.S.C. § 901 *et seq.*, which limits and regulates both the type of fee arrangements available and the amount of fees compensable, against the due process challenge of a prevailing claimant's attorney. The Court reasoned, *inter alia*, that the statute by its terms provides for the award of "reasonable" attorney's fees, and that the Benefits Review Board, which reviews challenged fee awards, "has construed the regulations of the Secretary of Labor governing the award of attorney's fees to permit consideration of the

attorney's *risk in going unpaid*." 494 U.S. at ___, 108 L.Ed.2d at 717 (emphasis supplied).

The plurality in *Delaware Valley II* admitted that "without the promise of risk enhancement some lawyers will decline to take cases[,]" but the plurality nonetheless remained confident that "the goal of the fee-shifting statutes" will be achieved. The plurality in fact underestimated the role of contingent risk enhancers in attracting counsel "in any market where there are competent lawyers whose time is not fully occupied by other matters." 483 U.S. at 725. In reality, virtually no contracts are made for contingent representation at noncontingent hourly rates. To restrict the use of enhancers — in the belief that plaintiffs will always be able to find representation from lawyers who do not place a higher "opportunity cost" on their time — ignores the economic reality that even those clients who are more empowered are unable to find such bargains. It is unreasonable to impose a condition on compensation that is *virtually never accepted* in voluntary agreements between lawyers and their clients.

The plurality's ultimate concern in *Delaware Valley II* was that contingent risk enhancement necessarily would compensate "plaintiff's lawyers for not prevailing against defendants in other cases." 483 U.S. at 725. But this is simply not the case. The award of enhancers does not compensate plaintiffs' counsel for cases they may have lost; rather, enhancers compensate for the risk associated with the case or cases in which they prevail. The defendant who loses a case brought under a fee-shifting statute thus is not paying for plaintiff's counsel's "losing" cases, any more than a plaintiff in a personal injury case, who must pay a contingency fee out of a damages award, is paying for his or her lawyer's losing cases. In each case the contingency risk factor is simply a component of the attorney's reasonable compensation. Thus, if *Dague* were

the only case ever to arise under the Solid Waste Disposal Act, the market would still drive respondents' attorneys to demand an appropriate risk-adjusted rate.

If the attorney's fees provisions were interpreted to limit fees awards to risk-free rates, then attorneys would work on other cases that paid the market rate on a current, risk-free hourly basis. Indeed, the dearth of attorneys willing to take on certain types of public interest litigation, as a result of the associated financial risk, is well documented. *See, e.g.*, Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. Review of Law & Social Change 535, 537-38 (1990) ("numerous attorneys have been forced to withdraw from civil rights practice for financial reasons. . . . The shortage of competent civil rights attorneys has reached crisis proportions, a fact which has been recognized by several state and federal courts," citing authorities); Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy*, 5 Lab. Law. 63 (1989) ("private counsel representing plaintiffs in equal employment cases have become an endangered species, in many places extinct"); *U.S. v. City and County of San Francisco*, 748 F.Supp. 1416, 1434 (N.D. Cal. 1990) (documenting shortage of employment discrimination counsel in San Francisco Bay Area).

Of course some attorneys might still be willing to provide what would amount to *pro bono* services by working at less than the prevailing risk-adjusted rate. Justice White has thus suggested in *Delaware Valley II* that enhancers are not needed "in those cases where plaintiffs secure help from organizations whose very purpose is to provide legal help through salaried counsel to those who themselves cannot afford to pay a lawyer." 483 U.S. at 726. Yet this argument ignores the fact that adequate

attorney's fees awards are a prerequisite to the continued existence of these organizations. The argument is also empirically refuted by the scant number of such organizations. *Delaware Valley II*, 483 U.S. at 743 (Blackmun, J. dissenting). Further, if not-for-profit organizations are not awarded fees commensurate with the amounts attainable in the private market, they will not be able to compensate as many attorneys at market rates.[3/]

Moreover, in enacting fee-shifting statutes Congress surely intended to do more than merely supplement the eleemosynary efforts of the private bar. By including fee-shifting provisions in Section 1988 and in the statutes at issue here — and by *not* including limitations or prohibitions against contingent risk enhancers — Congress expressed its intent that prevailing plaintiffs' counsel be compensated for assuming the risk of embarking on complex federal fee-shifting litigation.

This approach has been followed in a variety of cases, including antitrust cases, which set the model for statutory fee-shifting litigation. As earlier noted, Section 1988 was enacted against a backdrop of attorney's fees enhancement in the antitrust field. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2nd Cir. 1974) (antitrust: contingent risk enhancer available because "despite the most vigorous and competent of efforts, success [in litigation] is never guaranteed"); *Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973) (antitrust: lodestar may be enhanced to reflect contingent nature); *In re Coordinated Pretrial Proceedings*,

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[3/] This Court has consistently held that the calculation of attorney's fees awards should not vary depending upon whether the prevailing party was represented by a not-for-profit organization or by private counsel. *See Blum v. Stenson*, 465 U.S. at 894; *Blanchard v. Bergeron*, 489 U.S. at 95.

410 F.Supp. 680, 691 (D. Minn. 1975) (antitrust: enhancers awarded to "take the contingent nature of this litigation . . . into consideration when awarding fees"); *Blank v. Talley Indus.*, 390 F.Supp. 1, 5-6 (S.D.N.Y. 1975) (antitrust: fee award based in part on contingent risk); *In re Gypsum Cases*, 386 F.Supp. 959, 961 (N.D. Cal. 1974) (enhancer over normal hourly rates awarded in seven-year antitrust case "in which, probably more than in any other such litigation, the congressional objective of private antitrust enforcement was realized"), *aff'd*, 565 F.2d 1123 (9th Cir. 1977); *Arenson v. Board of Trade*, 372 F.Supp. 1349, 1357-58 (N.D. Ill. 1974) (enhancer over normal hourly rate awarded in landmark antitrust case); *Cherner v. Transitron Elec. Corp.*, 221 F.Supp. 55, 61 (D.Mass. 1963) (antitrust: contingent risk enhancer awarded because "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success") *modified on other grounds*, 326 F.2d 492 (1st Cir. 1964).

Contingent risk enhancers have also been awarded in security fraud cases. *See In re General Pub. Utils. Sec. Litig.*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,566, at 97,233-34 (D. N.J. Nov. 16, 1983) (enhancer of 3.45); *Steinberg v. Hardy*, 93 F.Supp. 873, 873-74 (D. Conn. 1950) (securities: contingent risk enhancer awarded, with court noting: that "actions, even when well-founded, will seldom be brought unless counsel can be found" on a contingent basis; that "obviously a retainer on a contingency basis is distinctly less attractive" than a guaranteed hourly rate; and that "unless the courts recognize the need to fix [contingent case] compensation on a more liberal basis," lawyers will not take these cases). *See also* Class Action Reports, July-Aug., Sept.-Oct., 1990, 249 at 548 (surveying over 400 securities and antitrust class

action cases from 1974 to 1990 and finding that, on average, enhancers of 1.83 were awarded).

Contingent risk enhancers have been awarded in a host of other areas governed by fee-shifting statutes. *See Green v. Transitron Elec. Corp.*, 326 F.2d 492, 496-97 (1st Cir. 1964) (stockholder's derivative action affirming fee award in part on contingent risk); *County of Suffolk v. LILCO*, 710 F.Supp. 1477, 1481 (E.D.N.Y. 1989) (RICO case: doubling of counsels' hourly rate), *aff'd in part, rev'd in part on other grounds*, 907 F.2d 1295 (2d Cir. 1990); *Municipal Auth. of Bloomsburg v. Pennsylvania*, 527 F.Supp. 982, 999-1000 (M.D. Pa. 1981) (enhancer, characterized by court as "extremely high" and "probably without precedent," awarded in case brought under Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251, et seq., because of "peculiar facts of this case"); *In re Cenco, Inc. Sec. Litig.*, 519 F.Supp. 322, 326-28 (N.D. Ill. 1981) (enhancer awarded to lead counsel, whom court praised for "very lean" staffing; other firms awarded lower enhancer); *Keith v. Volpe*, 86 F.R.D. 565, 575-77 (C.D. Cal. 1980) (enhancer awarded in environmental protection and civil rights action during period of high inflation); *Perlman v. Feldmann*, 160 F.Supp 310, (D. Conn. 1958) (attorney's fees award in stockholder's derivative action giving "great weight" to contingent nature of case).

Post-*Delaware Valley II* cases are to the same effect. *See Purdy v. Security Savings and Loan Association*, 727 F.Supp. 1266, 1279 (E.D. Wis. 1989) (enhancer over normal hourly rate awarded in securities fraud case); *Lattimore v. Oman Const. Co.*, 714 F.Supp. 1178,1179 (N.D. Ala. 1989), *aff'd*, 868 F.2d 437 (11th Cir. 1989); *Hidle v. Geneva County Bd. of Educ.*, 681 F.Supp. 752, 756-58 (M.D. Ala. 1988); *Rievman v. Burlington Northern Railway Co.*, 118 F.R.D. 29, 35 (S.D. N.Y. 1987) (enhancer for complexity, risk and benefit to class).

It is obvious that without the prospect of contingent risk enhancers, lawyers are more likely to behave as the market dictates they should — they will decline to take on public interest litigation, in a variety of fields, to the detriment of the public intended by Congress to be benefitted by the legislation containing the fee-shifting provisions. Judge Brieant noted this economic fact of life in In re Union Carbide, regarding securities fraud cases:

> The award of attorneys' fees in complex securities class action litigation is informed by the public policy that individuals damaged by violation of the federal securities laws should have reasonable access to counsel with the ability and experience necessary to analyze and litigate complex cases. Enforcement of the federal securities laws should be encouraged in order to carry out the statutory purpose of protecting investors and assuring compliance. . . . A large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided *and the risks undertaken*. These policies further support the award of a multiplier of counsel's lodestar fee.

724 F.Supp. at 169 (emphasis supplied). The award of contingent risk enhancers assures the enforcement of federal public interest fee-shifting legislation -- be it antitrust, securities, environmental or civil rights legislation -- by reasonably and fairly compensating counsel who prevail in actions brought under such statutes.

III. Justice O'Connor's Approach in *Delaware Valley II* is a Fair and Workable Way to Determine When Risk Enhancement is Necessary to Assure that the Prevailing Plaintiff is Awarded a Reasonable Attorney's Fee in a Fee-Shifting Case.

Counting the four dissenting Justices and Justice O'Connor, a majority of the Court in *Delaware Valley II* deemed that contingent risk enhancement is appropriate at least if the two prerequisites identified in Justice O'Connor's concurrence are met. First, the prevailing party must establish that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" 483 U.S. at 733 (citation omitted). Second, any enhancement for contingency must reflect "the difference in market treatment of contingent fee cases *as a class*, rather than . . . the 'riskiness' of any particular case." *Id*. at 731 (emphasis in original).

Justice O'Connor stated that:

> [D]istrict courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market. Haphazard and widely divergent compensation for risk can be avoided only if contingency cases are treated as a class; and contingency cases can be treated as a class only if courts strive for consistency from one fee determination to the next. Determinations involving different markets should also comport with each other. Thus, if a fee applicant attempts to prove that the relevant market provides greater compensation for contingency than the markets involved in previous cases, the applicant

> should be able to point to differences in the markets that would justify the different rates of compensation.

483 U.S. at 733.

Tying the amount of the enhancement to the market's treatment of similar contingent cases as a class eliminates the parade of horribles postulated by the *Delaware Valley II* plurality. Because the size of the enhancer would be insensitive to the riskiness of any particular case, plaintiffs' lawyers would still retain an incentive to take only those cases which have the highest probability of success. Conversely, class-based enhancement would not penalize defendants who have the strongest cases, because the high risk of plaintiffs' loss in such cases would not increase the enhancer. Consistent application of a class-based standard would also reduce the amount of *ex ante* risk born by the attorneys, who would not need to worry that a court might conclude *ex post facto* that the risk in a particular case did not justify the normal enhancer. Application of the class-based standard also ties the determination of a reasonable attorney's fee directly to Congress' purpose: to create and maintain a bar of competent counsel willing and able to represent plaintiffs in public interest litigation.

Justice O'Connor's approach is also eminently workable. It places the burden on the petitioning attorney to demonstrate that but for an enhancer the plaintiff would have had substantial difficulty retaining competent counsel. This burden can be fulfilled by looking to the voluntary bargains struck in the marketplace by attorneys and their clients. If the *Delaware Valley II* plurality's "doubt" proves valid, *i.e.*, if enhancers are not necessary to attract competent representation, then petitioning attorneys will simply fail to meet their burden under Justice O'Connor's analysis.

Since *Delaware Valley II*, a number of courts reviewing requests for fee enhancements have applied Justice O'Connor's analysis fairly and without obvious administrative difficulty. For example, *in Islamic Center of Miss. v. Starkville*, 876 F.2d 465, 472 (5th Cir. 1989), the Fifth Circuit remanded the District Court's denial of the requested contingent risk enhancer because the court had failed to make findings concerning the two prongs of Justice O'Connor's test. The Fifth Circuit stated:

> Justice O'Connor's instructions in *Delaware Valley Citizens' Council II* are explicit: the district court must consider whether a contingent enhancement would have been necessary to induce competent counsel to accept such cases at the time the case was undertaken and whether contingency cases as a class were treated differently from noncontingency cases.

Id. at 472. *See also Leroy v. City of Houston*, 831 F.2d 576, 583-84 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988) (trial court record and findings must support award of enhancer).

The Sixth Circuit has also applied Justice O'Connor's test. *See Conklin v. Lovely*, 834 F.2d 543, 553-554 (6th Cir. 1987) (remand where District Court failed to make specific finding of fact as to amount and necessity of enhancer awarded).

The Seventh Circuit has clearly adopted Justice O'Connor's test for awarding contingent risk enhancers in cases where the evidence shows that without the enhancement plaintiffs would have faced substantial difficulties in finding counsel in the local or other relevant market, and that the relevant market compensates for contingent risk. *See Skelton v. General Motors Corp.*, 860 F.2d 250, 254 n.3 (7th Cir. 1988), *cert. denied*, 493 U.S. 810, (1989);

Soto v. Adams Elevator Equipment Co., 941 F.2d 543, 553 (7th Cir. 1991); *McGuire v. Sullivan*, 873 F.2d 974, 978-79 (7th Cir. 1989). Thus, in *King v. Board of Regents*, 748 F.Supp. 686, 691-93 (E.D. Wis. 1990), a contingent risk enhancer was awarded based on the testimony of Milwaukee attorneys and the District Court's observations regarding the difficulty for plaintiffs in his court of finding competent counsel to accept civil rights cases on a contingency fee basis. However, the District Courts in the Seventh Circuit have not awarded contingent risk enhancers when Justice O'Connor's test was not found to have been met. *See Wolf v. Planned Property Management*, 735 F.Supp. 882, 887 (N.D. Ill. 1990); *Leigh v. Eagle*, 714 F.Supp. 1465, 1475-76 (N.D. Ill. 1989).

The Eighth Circuit has applied Justice O'Connor's analysis in three cases. *See Morris v. American National Can Corp.*, 952 F.2d 200,204-07 (8th Cir. 1991); *Hendrickson v. Brendstad*, 934 F.2d 158,162 (8th Cir. 1991); *Jackson v. Rheem Manufacturing Co.*, 904 F.2d 15, 16-17 (8th Cir. 1990).

The Ninth Circuit first applied Justice O'Connor's test in *Fadhl v. City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1988), a case brought under Title VII. The Ninth Circuit sustained the District Court's award of a contingent risk enhancer. The Ninth Circuit determined, on unrebutted evidence concerning both the market and plaintiff's difficulty in securing counsel, that within the relevant market an enhancer was necessary to attract competent counsel. *Id.* at 650-51.

In *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632 (9th Cir. 1989), a case arising under the Robinson-Patman Act, 15 U.S.C. § 13(a), and analogous Washington State law, the Ninth Circuit sustained the District Courts' pre-*Delaware*

Valley II award of a contingent risk enhancer. The Court specifically found:

> In this case there is strong uncontroverted evidence on permissible factors to support the district court's award. We conclude that the district court did not 'enhance [the] fee award any more than necessary to bring the fee within the range that would attract competent counsel.' *Fadhl*, 859 F.2d at 651 (quoting *Delaware Valley II*, 483 U.S. at 733, 107 S.Ct. at 3091 (O'Connor, J. concurring)). We are also satisfied that the evidence shows why the lodestar amount would not be reasonable.

879 F.2d at 637. *See also Oviatt v. Pearce*, 92 D.A.R. 723, 728 (9th Cir. Jan. 16, 1992) (denial of enhancer appropriate where District Court had found that plaintiff had *failed* to show, in the relevant Oregon market for the class of cases involved, that "without an enhancement, plaintiffs in similar [relatively simple damages cases] will face substantial difficulties in finding counsel"); *Bernardi v. Yeutter*, 951 F.2d 971, 975 (9th Cir. 1991) (reversal of denial of enhancer and award of 2.0 enhancer, where District Court had failed to "address whether sufficient independent evidence had been presented that demonstrated that San Francisco no longer has a 'manifest need . . . for fee enhancements in civil rights cases' *Fadhl*, 859 F.2d at 651"); *Bouman v. Block*, 940 F.2d 1211, 1236 (9th Cir. 1991) (case remanded to the District Court "to consider evidence of the market conditions in Los Angeles and determine whether [plaintiff] is entitled to the 2.0 multiplier she has requested or some other multiplier in excess of the one and one third figure the district court judge used"); *Merritt v. Mackey*, 932 F.2d 1317 (9th Cir. 1991) (reversal of a District Court's enhancement of an attorney's fee that was itself based on the contingent risk inherent in bringing the action); *D'Emanuele v. Montgomery Ward & Co. Inc.*,

904 F.2d 1379, 1384, 1387 (9th Cir. 1990) (reversal of District Court's denial of enhancer in ERISA action).

The Eleventh Circuit has also relied on Justice O'Connor's analysis in approving the award of contingent risk enhancers. *Lattimore v. Oman Construction*, 868 F.2d 437, 439 (11th Cir. 1989) (per curiam). The Court concluded that "[a] fees award may be increased by 100% to compensate attorneys for the risk of accepting a case on a contingency basis and to attract competent counsel." *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1248 (11th Cir. 1991).

These decisions fully validate Justice O'Connor's approach to contingent risk enhancement in federal fee-shifting litigation. The courts applying Justice O'Connor's analysis have demonstrated their ability to elicit and examine the relevant evidence and, on that basis, fairly exercise their discretion to compensate prevailing counsel for the market factor of contingent risk. This approach thus is workable in practice and consistent in principle with Congress' intent that counsel be reasonably compensated for their efforts in enforcing public interest legislation.

CONCLUSION

For the forgoing reasons, the decision below should be affirmed.

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Dated: April 10, 1992

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

Alabama Employment Lawyers Association
714 South 29th Street
Birmingham, AL 35233-2845
(205) 322-6631

The Alabama Employment Lawyers Association (AELA) is a non-profit organization consisting of approximately 25 lawyers who concentrate on the representation of individual employees in employment and labor matters. Some members of AELA are active in representing employees in federal employment discrimination matters, while others represent clients under the National Labor Relations Act or state causes of action.

Members of AELA who handle individual employment discrimination cases usually do so on a contingency fee basis. Because the judges in the federal courts of Alabama are inconsistent in the awarding of contingency enhancers, those members find it difficult to devote much time to such cases. If the Supreme Court eliminates the possibility of recovering fees similar to what AELA's members could expect in the market place for other contingent work, they will be forced to devote their time and resources to other kinds of cases and to clients with federal employment discrimination claims who can afford to pay fees on an non-contingent basis.

American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights and this nation's civil rights laws. Based on the experience of the ACLU, it is

clear that the availability of statutory attorney's fees calculated at fair market rates is critical in recruiting private attorneys to undertake civil rights litigation and thereby promote the values of the ACLU. In addition, the ACLU's own entitlement to attorney's fees is a function of market rates and, thus, any change in the way those rates are calculated for attorney's fee purposes directly affects the work of the ACLU and its affiliates throughout the country. For both of these reasons, the ACLU has a vital interest in the outcome of this case.

Joaquin G. Avila, Esq.
1774 Clear Lake Avenue
Milpitas, CA 95035-7014
(408) 263-1317

Joaquin G. Avila is a solo practitioner. His entire practice consists of representing plaintiffs in challenges to electoral systems at various governmental and quasi-governmental levels. These challenges are based primarily on the Voting Rights Act, 42 U.S.C. § 1973, and/or the United States Constitution. Mr. Avila takes all of these cases on a pure contingency basis, and depends on court-awarded attorney's fees for a substantial portion of his compensation. Without substantial enhancers to compensate for the contingency of not being paid at all, he would be forced to limit his practice and take on either hourly-rate paying clients or contingency cases with the promise of large monetary damages awards. Substantial fee enhancements are necessary to make a contingency-based practice such as Mr. Avila's economically feasible.

Cooper, Mitch, Crawford, Kuykendall & Whatley
1100 Financial Center
505 Twentieth Street North
Birmingham, AL 35203
(205) 328-9576

Cooper, Mitch, Crawford, Kuykendall & Whatley, a law firm of thirteen lawyers in Birmingham, Alabama, represents labor unions throughout the Southeast. It also has an active plaintiffs' tort practice and represents the City of Birmingham and historically black colleges in civil rights matters.

In recent years, the firm has represented a large number of individuals in employment discrimination cases. Almost all of these cases are by necessity contingency fee cases. Even with the contingency enhancers approved by the Eleventh Circuit, it is difficult to make this part of the practice financially productive. If the Supreme Court eliminates the possibility of recovering enhanced fees, then the firm will cease handling employment discrimination cases on a contingency basis; instead, the firm will devote its time and resources to other kinds of cases and to clients who can afford to pay fees on a non-contingent basis.

Disability Rights Education and Defense Fund, Inc.
2216 Sixth Street
Berkeley, CA 94710
(510) 644-2555

The Disability Rights Education and Defense Fund, Inc. (DREDF) is a national disability civil rights organization dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote the full integration of citizens with disabilities into the American mainstream, DREDF has represented and/or assisted hundreds of people with disabilities who have been denied their rights and excluded

from opportunities because of false and demeaning stereotypes.

DREDF's efforts to enforce federal statutes protecting the rights of people with disabilities depend in large part on its ability to work with the private bar in both individual and class action lawsuits and to refer such cases to private counsel. This ability would be seriously affected if there were no possibility of enhancers to attorney's fees awards for contingent risk.

Jay-Allen Eisen Law Corporation
1000 G Street, Suite 300
Sacramento, CA 95814
(916) 444-6171

Jay-Allen Eisen Law Corporation is a private law firm that does a significant amount of public interest work and depends in part on fees recovered in these cases as a means of financing these activities. The firm's interest in this case is to ensure that counsel performing legal services which benefit the public are adequately compensated, and will therefore be encouraged to continue performing these legal services.

Erickson, Beasley, Hewitt & Wilson
12 Geary Street, 8th Floor
San Francisco, CA 94108
(415) 781-3040

Erickson, Beasley, Hewitt & Wilson is a twelve lawyer firm with an active civil rights docket. This docket has consisted primarily of the representation of plaintiffs and plaintiff classes in complex civil rights matters in the federal courts, often against the federal government.

All of these complex civil rights cases have been contingency fee cases. Such cases are too complicated and too time consuming -- in summary, too expensive -- for

any individual plaintiff or plaintiff class to pay the firm's billings. It has always been difficult to make this area of the practice financially feasible. Without the possibility of a fee award enhancement, the firm's civil rights docket would become financially impossible, and the firm would have to drastically curtail its representation in this area of the law.

Law Office of Alan B. Exelrod
660 Market Street, Suite 300
San Francisco, CA 94104
(415) 392-2800

Alan B. Exelrod is a solo practitioner representing plaintiffs in litigation involving employment and civil rights. He has been engaged in this practice as a solo practitioner for ten years and has been involved in civil rights law since graduating from law school in 1968.

None of the plaintiffs Mr. Exelrod represents can afford to pay him his full hourly rate. He therefore assumes the risk of losing money every time he files a lawsuit. Many of these cases are hard fought over a long period of time. In calculating the economics of his practice, enhancement of fees is central to his being able to represent clients who cannot pay hourly fees. He generally does not work with civil rights organizations but litigates such cases on his own or with other private counsel.

Ferguson, Stein, Watt, Wallas, Adkins
& Gresham, P.A.
700 East Stonewall Street, Suite 730
Charlotte, NC 28202
(704) 375-8461

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., a 14-lawyer law firm, has devoted a substantial portion of its practice to representing plaintiffs in civil rights cases including school desegregation litigation,

voting rights litigation, and employment discrimination litigation on a contingency basis. Most civil rights plaintiffs do not have funds to hire attorneys on an hourly basis. Very few lawyers in North Carolina are willing to represent plaintiffs in civil rights cases when their fee will be contingent. Because of the firm's difficulty in obtaining reasonable fees, the firm has decreased its civil rights caseload over the past few years. If the Supreme Court eliminates the opportunity to obtain fee enhancements in cases that are contingent, it is likely that the firm will continue to take fewer civil rights cases. Substantial fee enhancements are necessary to make a contingency civil rights practice viable.

The Law Offices of Richard B. Fields
The Wright Carriage House
688 Jefferson Ave.
Memphis, TN 38105
(901) 529-8503

Mr. Fields and his former partners have practiced civil rights law in Memphis for over 20 years. His predecessor firm, Ratner & Sugarmon, was the first integrated law firm in Memphis and was involved in landmark civil rights litigation involving school desegregation, employment discrimination, police misconduct, and housing discrimination. The firm served as counsel in landmark civil rights cases before this Court, including *Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984), *Brandon v. Hold*, 469 U.S. 464 (1985), and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979). All of this work was undertaken on a contingency basis with the expectation of court-awarded attorney's fees. Enhanced attorney's fees awards are necessary to enable private law firms to undertake civil rights litigation.

Julian, Olson & Lasker, S.C.
330 East Wilson Street
P.O. Box 2206
Madison, WI 53701-2206
(608) 255-6400

Julian, Olson & Lasker, S.C., is a three lawyer firm that enjoys a reputation for cutting-edge constitutional and civil rights litigation on behalf of plaintiffs. Its attorneys have handled voting rights, school desegregation, employment housing discrimination and other civil rights cases across the country, many in cooperation with the NAACP Legal Defense and Educational Fund, Inc. Almost all of the firm's plaintiffs' cases are taken pursuant to contingent fee arrangements, but because attorney's fees awards have not been adequate, the firm has been forced in recent years to avoid cases in which its compensation will be wholly derived from court-awarded attorney's fees. The firm has actively sought defense work and has begun to require substantial retainers in contingent fee cases for plaintiffs. Low income clients whose claims appear meritorious but which lack substantial monetary damages components are regularly turned away, and many of these clients simply do not find lawyers to represent them at all.

Legal Services for Prisoners with Children
1535 Mission Street
San Francisco, CA 94103
(415) 255-7036

Legal Services for Prisoners with Children (LSPC) is a legal services organization focusing on the needs of prisoners, their children, and family members. Founded in 1978, LSPC provides litigation assistance to lawyers and legal advocates working with prisoners and their families on a wide range of civil legal issues. LSPC attorneys are currently co-counsel in several class actions on behalf of prisoners, parolees, and family members. LSPC joins this *amicus* brief because it is deeply concerned about the

ability of prisoners and their families to obtain legal counsel to represent them. There are few lawyers willing to represent indigent prisoners, and eliminating the potential for prevailing parties to recover enhanced attorney's fees awards would make it even harder for prisoners and their families to obtain representation.

Legal Services of Northern California
515 Twelfth Street
Sacramento, CA 95814
(916) 444-6760

Legal Services of Northern California (LSNC) is a private non-profit corporation organized and existing under the laws of the State of California for the purpose of delivering free legal assistance to individuals and groups who meet income eligibility requirements. Founded thirty-five years ago, LSNC maintains offices in five cities serving 18 counties in northern California. Last year alone, LSNC attorneys served more than 17,000 impoverished citizens with critical legal problems.

In cooperation with local bar associations, LSNC operates Voluntary Legal Services Program of Northern California, providing legal assistance in civil law matters through referrals to private attorneys. LSNC's interest in this case is to preserve its ability to refer cases to the private bar, and to attract competent counsel for such referrals.

Mexican American Legal Defense and Educational Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2612

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of His-

panics living in the United States. In order to pursue this objective -- particularly with regard to vindicating the rights of Hispanics to be free from discrimination in education, employment, and full political participation -- MALDEF relies heavily on private practitioners acting as cooperating attorneys to represent Hispanics who have been the victims of discrimination. These private attorneys, who are paid neither by MALDEF nor by their impecunious clients, undertake such legal representation in reliance on market-based statutory fee awards paid only at the conclusion of cases in which their clients have prevailed. Only through fee awards which take into account the manner in which contingency risk operates in the marketplace can Hispanics have any chance of vindicating their statutory and constitutional rights in court.

NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 219-1900

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit organization organized as a legal aid society under the laws of the State of New York. It was formed to assist African Americans in securing their constitutional rights by the prosecution of lawsuits. LDF depends on members of the private bar, most of whom are single practitioners or in small firms, to associate with it as co-counsel in order to carry out its work. These attorneys, in turn, depend on the availability of attorney's fees under the various civil rights statutes to be able to participate in complex and time-consuming federal litigation. LDF has participated as counsel and as *amicus curiae* in most of the leading attorney's fees cases in this and other courts. For the above reasons, LDF has a vital interest in the outcome of this case.

National Employment Lawyers Association
535 Pacific Avenue
San Francisco, CA 94133
(415) 397-6335

The National Employment Lawyers Association (NELA) (Advocates for Employee Rights) is a non-profit corporation with over 1100 lawyer members in 49 states. Its members specialize in representing individual employees in employment rights cases. Most NELA members regularly handle discrimination cases under various civil rights statutes that provide for attorney's fees for the prevailing plaintiff. NELA and its members are constantly litigating "multiplier" fee enhancement issues in federal court and are deeply concerned about the necessity of obtaining a reasonable enhancement as an incentive to ensure that lawyers are available for victims of discrimination.

Patterson, Harkavy, Lawrence, Van Noppen & Okun
206 New Bern Place
P.O. Box 27927
Raleigh, NC 27611
(919) 755-1812

Patterson, Harkavy, Lawrence, Van Noppen & Okun is an eight lawyer firm with offices in Raleigh and Greensboro, North Carolina. Historically, a significant part of the firm's practice has involved the representation of plaintiffs in employment discrimination and constitutional tort litigation. The vast majority of these plaintiffs are unable to pay hourly fees and hence, if they are to pursue their claims, representation must be on a contingent basis.

Firms such as Patterson, Harkavy, can take such cases only if the compensation we receive for successful public interest litigation exceeds fees generated by other work where compensation is non-contingent. The firm cannot

continue to turn away clients who will pay on an hourly basis at market rates in favor of cases where the firm risks spending hundreds of hours without compensation, and then, if it prevails, can expect to receive only the same hourly fee it would have received, without risk, from other clients. Nor can public interest litigation compete with other traditional contingent cases where success normally results in fees substantially in excess of the firm's non-contingent hourly rate. Unless fees awarded by courts for successful public interest litigation reflect the market practice of enhanced compensation for contingent work, access to the courts for clients with claims of constitutional violations and discrimination will effectively be denied.

Richard M. Pearl
685 Market Street, #370
San Francisco, CA 94105
(415) 243-9912

Richard M. Pearl is a sole practitioner. He is the author of California Continuing Education of the Bar's *California Attorney's Fee Awards Practice* and its annual supplements, and is a member of the California State Bar's Attorney's Fees Task Force. In his practice, he has represented numerous profit and non-profit law firms claiming court awarded attorney's fees, and also has served as an expert witness for both fee claimants and opponents. Through that experience, he has seen first hand the monumental risk and commitment undertaken by attorneys who are willing to represent victims of civil rights and environmental law violations. The prospect of receiving a fee that will recognize that risk, as the private market does, is crucial to permitting and encouraging those attorneys to continue in this field. Without a fee that recognizes risk, the simple demands of the market will drive even the most committed attorneys out of the field, undermining Congress's purpose in providing fee-shifting statutes.

Planned Parenthood Affiliates of California
1029 K Street, Suite 24
Sacramento, CA 95814
(916) 446-5247

Planned Parenthood Affiliates of California (PPAC) is a non-profit corporation organized and existing under the laws of the State of California. PPAC's members are 16 local Planned Parenthood affiliate agencies throughout California that provide comprehensive family planning services in their various communities. PPAC advocates in the Legislature, before administrative agencies, and in the courts for provision of comprehensive family planning services on behalf of approximately 160 public and private family planning agencies, as well as individuals.

PPAC is interested in this case because PPAC depends heavily on the private bar to represent its member affiliates in cases involving family planning services. The possibility of recovering fee enhancers attracts a larger pool of skilled attorneys who are willing to undertake representation at reduced rates or on a *pro bono* basis in the expectation that if they prevail they may recover attorney's fees at market rates.

Prison Law Office
General Delivery
San Quentin, CA 94964
(415) 457-9144

The Prison Law Office (PLO) is a non-profit legal services organization dedicated to providing civil legal services to California state prisoners. This office devotes a major portion of its practice to class action civil rights litigation seeking exclusively injunctive relief. The office does not charge clients a fee and obtains approximately 75% of its funding from attorney's fees. The issue of contingency risk enhancement is particularly important to

this organization because it is crucial to its efforts to attract private firms to assist with large institutional litigation.

Public Advocates, Inc.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

Public Advocates, Inc. is a non-profit organization devoted to representing plaintiffs in a wide variety of public interest litigation. Public Advocates receives no payment from any of its clients, and does not receive sufficient funding from charitable contributors to finance its work. Thus, Public Advocates depends for its existence in large part on court-awarded attorney's fees. All of Public Advocates' cases are taken on a contingency basis, with the expectation that if plaintiffs prevail, they will be entitled to attorney's fees at market rates. Public Advocates often requires outside cooperating counsel to assist it in its most complex cases. Without the prospect of recovering attorney's fees, including enhancers to compensate for contingent risk, it would be difficult for this firm to attract outside counsel. Public Advocates is thus vitally interested in the outcome of this case.

Puerto Rican Legal Defense and Education Fund, Inc.
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360

The Puerto Rican Legal Defense & Education Fund (PRLDEF) is a not-for-profit civil rights organization dedicated to protecting and furthering the rights of Puerto Ricans and other Latinos. PRLDEF receives approximately 10 calls every day from persons who are seeking legal assistance in pursuing civil rights claims. Many of these individuals have already unsuccessfully sought to retain attorneys in private practice to take their cases. Similarly, PRLDEF has been unable to find attorneys who

are willing to serve as cooperating co-counsel on these matters. The almost universal response from the private bar is that they cannot afford to take civil rights cases because the likelihood of success is too risky and the amount of attorney's fees too small. PRLDEF believes that in order for an award of attorney's fees to be an enticement to attorneys to handle these matters, there must be a contingency enhancement.

Rosen, Bien & Asaro
155 Montgomery Street, 8th Floor
San Francisco, CA 94104
(415) 433-6830

Rosen, Bien and Asaro, a seven lawyer firm, devotes a substantial part of its practice to complex litigation under federal fee-shifting statutes, including state-wide prisoner class actions and employment discrimination litigation. The firm's clients in these cases invariably are unable to afford legal representation except on a contingency basis. Particularly in prisoner class actions, where the relief sought is injunctive or declaratory only, and where typically no monetary damages are sought, the only basis for the firm's compensation, if plaintiffs prevail, is an award of reasonable attorney's fees pursuant to the applicable fee-shifting statutes. It is the availability of contingency risk enhancers that makes it economically feasible for a small firm like ours to take on such cases. If no such enhancers were available, the firm would be forced substantially to limit its representation of clients whose civil rights have been violated in favor of clients willing and able to pay on an hourly basis, or in favor of contingency cases with the promise of a large monetary damages award.